

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN

**LARRY PHILIP FONTAINE** in his personal capacity and in his capacity as the Executor of the estate of **Agnes Mary Fontaine, deceased**, MICHELLINE AMMAQ, PERCY ARCHIE, CHARLES BAXTER SR., ELIJAH BAXTER, EVELYN BAXTER, DONALD BELCOURT, NORA BERNARD, JOHN BOSUM, JANET BREWSTER, RHONDA BUFFALO, ERNESTINE CAIBAIOSAI-GIDMARK, MICHAEL CARPAN, BRENDA CYR, DEANNA CYR, MALCOLM DAWSON, ANN DENE, BENNY DOCTOR, LUCY DOCTOR, JAMES FONTAINE in his personal capacity and in his capacity as the Executor of the Estate of Agnes Mary Fontaine, deceased, VINCENT BRADLEY FONTAINE, DANA EVA MARIE FRANCEY, PEGGY GOOD, FRED KELLY, ROSEMARIE KUPTANA, ELIZABETH KUSIAK, THERESA LAROCQUE, JANE McCULLUM, CORNELIUS McCOMBER, VERONICA MARTEN, STANLEY THOMAS NEPETAYPO, FLORA NORTHWEST, NORMAN PAUCHEY, CAMBLE QUATELL, ALVIN BARNEY SAULTEAUX, CHRISTINE SEMPLE, DENNIS SMOKEYDAY, KENNETH SPARVIER, EDWARD TAPIATIC, HELEN WINDERMAN and ADRIAN YELLOWKNEE

Plaintiffs

and

**THE ATTORNEY GENERAL OF CANADA**, THE PRESBYTERIAN CHURCH IN CANADA, THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE UNITED CHURCH OF CANADA, THE BOARD OF HOME MISSIONS OF THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH, THE BAPTIST CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN BAY, THE CANADA IMPACT NORTH MINISTRIES OF THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (also known as THE NEW ENGLAND COMPANY), THE DIOCESE OF SASKATCHEWAN, THE DIOCESE OF THE SYNOD OF CARIBOO, THE

FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE METHODIST CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (ALSO KNOWN AS THE METHODIST MISSIONARY SOCIETY OF CANADA), THE INCORPORATED SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE ANGLICAN CHURCH OF THE DIOCESE OF QUEBEC, THE SYNOD OF THE DIOCESE OF ATHBASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE ANGLICAN SYNOD OF THE DIOCESE OF BRITISH COLUMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE SYNOD OF THE DIOCESE OF NEW WESTMINSTER, THE SYNOD OF THE DIOCESE OF YUKON, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE BOARD OF HOME MISSIONS AND SOCIAL SERVICE OF THE PRESBYTERIAN CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA, SISTERS OF CHARITY, A BODY CORPORATE ALSO KNOWN AS SISTERS OF CHARITY OF ST. VINCENT DE PAUL, HALIFAX, ALSO KNOWN AS SISTERS OF CHARITY HALIFAX, ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX, LES SOEURS DE NOTRE DAME-AUXILIATRICE, LES SOEURS DE ST. FRANCOIS D'ASSISE, INSITUT DES SOEURS DU BON CONSEIL, LES SOEURS DE SAINT-JOSEPH DE SAINT-HYANCITHE, LES SOEURS DE JESUSMARIE, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE, LES SOEURS DE L'ASSOMPTION DE LA SAINT VIERGE DE L'ALBERTA, LES SOEURS DE LACHARITE DE ST.-HYACINTHE, LES OEUVRES OBLATES DE L'ONTARIO, LES RESIDENCES OBLATES DU QUEBEC, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE JAMES (THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY), THE CATHOLIC DIOCESE OF MOOSONEE, SOEURS GRISES DE MONTREAL/GREY NUNS OF MONTREAL, SISTERS OF CHARITY (GREY NUNS) OF ALBERTA, LES SOEURS DE LACHARITE DES T.N.O., HOTEL-DIEU DE NICOLET, THE GREY NUNS OF MANITOBA INC.-LES SOEURS GRISES DU MANITOBA INC., LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE D'HUDSON-THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY, MISSIONARY OBLATES-GRANDIN PROVINCE, LES OBLATS DE MARIE IMMACULEE DU MANITOBA, THE ARCHIEPISCOPAL CORPORATION OF REGINA, THE SISTERS OF THE PRESENTATION, THE SISTERS OF ST. JOSEPH OF SAULT ST.

MARIE, SISTERS OF CHARITY OF OTTAWA, OBLATES OF MARY IMMACULATE-ST. PETER'S PROVINCE, THE SISTERS OF SAINT ANN, SISTERS OF INSTRUCTION OF THE CHILD JESUS, THE BENEDICTINE SISTERS OF MT. ANGEL OREGON, LES PERES MONTFORTAINS, THE ROMAN CATHOLIC BISHOP OF KAMLOOPS CORPORATION SOLE, THE BISHOP OF VICTORIA, CORPORATION SOLE, THE ROMAN CATHOLIC BISHOP OF NELSON, CORPORATION SOLE, ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD, ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN, LA CORPORATION ARCHIEPISCOPALE CATHOLIQUE ROMAINE DE ST. BONIFACE, LES MISSIONNAIRES OBLATES SISTERS DE ST. BONIFACE-THE MISSIONARY OBLATES SISTERS OF ST. BONIFACE, ROMAN CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT, THE ROMAN CATHOLIC BISHOP OF THUNDER BAY, IMMACULATE HEART COMMUNITY OF LOS ANGELES CA, ARCHDIOCESE OF VANCOUVER-THE ROMAN CATHOLIC ARCHBISHOP OF VANCOUVER, ROMAN CATHOLIC DIOCESE OF WHITEHORSE, THE CATHOLIC EPISCOPALE CORPORATION OF MACKENZIEFORT SMITH, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT, EPISCOPAL CORPORATION OF SASKATOON, OMI LACOMBE CANADA INC. and MT. ANGEL ABBEY INC

Defendants

Proceedings under the *Class Proceedings Act*, 1992, S.O. 1992, c.6

Julian Falconer, Julian Roy and Meaghan Daniel, for the TRC

Catherine Coughlan, Paul Vickery and Kim McCarthy, for Canada

Stuart Wuttke, for the intervenor Assembly of First Nations

Hugo Prud'homme, for the intervenor Inuit Representatives

**Goudge J.A. (*ad hoc*):**

**The Genesis of the Proceedings**

[1] On May 8, 2006, the Government of Canada (Canada) concluded the Indian Residential Schools Settlement Agreement (the Settlement Agreement) with the Assembly of First Nations (the AFN), the Inuit Representatives, counsel on behalf of former Indian Residential Schools (IRS) students and a number of other parties. The Settlement Agreement settled the individual and class actions that had been brought by former students against Canada and others.

[2] Because the settlement of class actions was involved, identical court approvals of the Settlement Agreement were sought in all 13 provincial and territorial jurisdictions, pursuant to the applicable class proceedings legislation. On December 15, 2006, the Ontario Superior Court of Justice approved the Settlement Agreement, made it a part of its judgment of that date, and ordered its implementation in accordance with the judgment and any further order of the court.

[3] On March 8, 2007, the court issued an Implementation Order for the effective implementation and administration of the Settlement Agreement. That order provides that any matter arising from the Settlement Agreement that requires direction from the court will be commenced by the filing of a Request for

Direction with the court. The supervising judge is then to determine how the matter will proceed.

[4] The Truth and Reconciliation Commission (the TRC), which was established by the Settlement Agreement, filed a Request for Direction on April 5, 2012, seeking the court's direction on a number of matters concerning Canada's obligations under the Settlement Agreement. The supervising judge, Chief Justice Winkler, directed that the TRC and Canada first participate in a judicial mediation of these matters before me.

[5] Two legal issues emerged from the mediation as matters requiring the court's direction. The TRC therefore revised its Request for Direction accordingly on October 15, 2012.

[6] The two issues on which it now requests the court's direction are:

- a) What are Canada's obligations under the Settlement Agreement with respect to archived documents at Library and Archives Canada (LAC)?
- b) What are Canada's obligations under the Settlement Agreement in relation to the TRC's legacy mandate?

[7] Chief Justice Winkler has directed that the TRC's Revised Request for Direction be heard by me sitting as a judge of the Ontario Superior Court of Justice, since it is a hearing at first instance, with the usual rights of appeal. He also directed that, at the same time, I hear the Amended Notice of Application

raising the same two questions that was filed by the TRC as a separate proceeding in the Ontario Superior Court of Justice. Finally, he directed that the preliminary objections to the TRC's right to bring these proceedings raised by Canada be heard by me as well.

[8] Participants in these proceedings in addition to the TRC and Canada included the AFN and the Inuit Representatives, to whom I granted intervenor status. All four have filed affidavit material. I have also received written submissions from the University of Manitoba, the National Consortium and Independent Counsel. Canada has moved to strike the affidavits of Kent Roach and Ryan Bresser filed by the TRC, and the affidavits of Shawn Atleo and Nellie Cournoyea filed by the AFN and the Inuit Representatives respectively.

[9] There are therefore four matters before me:

- (1) Canada's preliminary Request for Direction to strike four affidavits;
- (2) Canada's preliminary Request for Direction to strike both the TRC's Revised Request for Direction and its Amended Notice of Application;
- (3) The TRC's Revised Request for Direction and Amended Notice of Application concerning Canada's obligations with respect to LAC documents;
- (4) The TRC's Revised Request for Direction and Amended Notice of Application concerning Canada's obligations in relation to the TRC's legacy mandate.

## **The Background**

[10] Starting in the 1880s, Canada undertook responsibility for the creation of the IRS system for the education of Aboriginal children. The schools were nearly all operated jointly by Canada and various religious organizations. By the time the last residential school closed in 1996, more than 150,000 Aboriginal, Inuit and Métis children had been taken from their homes and communities and required to attend these institutions. The sternly assimilationist vision embodied in the IRS system was described in the Report of the Royal Commission on Aboriginal Peoples at page 337 as follows:

The tragic legacy of residential education began in the late nineteenth century with a three-part vision of education in the service of assimilation. It included, first, a justification of removing children from their communities and disrupting Aboriginal families; second, a precise pedagogy for re-socializing children in the schools; and third, schemes for integrating graduates into the non-Aboriginal world.

[11] The injustices and harms experienced by Aboriginal people as a result of this tragic episode in Canadian history caused many Aboriginal groups, particularly the AFN, to seek a response that would address both compensation and the need for continued healing. In addition, by the 1990s, litigation over the alleged abuse of students attending the schools began in earnest.

[12] It was in this context that Canada appointed the Honourable Frank Iacobucci on May 30, 2005 as Federal Representative to lead discussions with interested parties towards the resolution of the legacy of Indian Residential

Schools. The shared objective was a fair and lasting resolution of the painful negative experiences of former students, the enduring impacts of these experiences, and the resolution of all individual and class actions.

[13] The result of the lengthy and detailed negotiations that ensued was, first, the Agreement in Principle, concluded by the parties on November 20, 2005, and approved by the previous Government of Canada. That was followed on May 8, 2006 by the conclusion of the Settlement Agreement, which was approved by the present Government of Canada and signed by Canada, the AFN and other leading Aboriginal organizations, some 50 religious organizations and some 79 law firms conducting the relevant litigation.

[14] In its fourth recital, the Settlement Agreement describes the objectives of the Agreement in Principle which clearly set the course for what followed:

D. The Parties entered into an Agreement in Principle on November 20, 2005 for the resolution of the legacy of Indian Residential Schools:

- (i) to settle the Class Actions and the Cloud Class Action, in accordance with and as provided in this Agreement;
- (ii) to provide for payment by Canada of the Designated Amount to the Trustee for the Common Experience Payment;
- (iii) to provide for the Independent Assessment Process;
- (iv) to establish a Truth and Reconciliation Commission;

(v) to provide for an endowment to the Aboriginal Healing Foundation to fund healing programmes addressing the legacy of harms suffered at Indian Residential Schools including the intergenerational effects; and

(vi) to provide funding for commemoration of the legacy of Indian Residential Schools.

[15] To accomplish this broad agenda, the Settlement Agreement, which itself ran to almost 100 pages, incorporated 25 additional schedules. Each addresses in detail a different aspect of the Settlement Agreement.

[16] In section 3.03 of the Settlement Agreement, Canada agreed to provide \$60 million for the establishment and work of the TRC. Schedule N established its mandate.

[17] The parties open Schedule N with these compelling words:

*There is an emerging and compelling desire to put the events of the past behind us so that we can work towards a stronger and healthier future. The truth telling and reconciliation process as part of an overall holistic and comprehensive response to the Indian Residential School legacy is a sincere indication and acknowledgement of the injustices and harms experienced by Aboriginal people and the need for continued healing. This is a profound commitment to establishing new relationships embedded in mutual recognition and respect that will forge a brighter future. The truth of our common experiences will help set our spirits free and pave the way to reconciliation.*  
[Emphasis in original.]

[18] In section 1 of Schedule N the parties describe the goals of the TRC. For the particular purposes of this proceeding (e) and (f) are of particular importance:

The goals of the Commission shall be to:

- (a) Acknowledge Residential School experiences, impacts and consequences;
- (b) Provide a holistic, culturally appropriate and safe setting for former students, their families and communities as they come forward to the Commission;
- (c) Witness,<sup>1</sup> support, promote and facilitate truth and reconciliation events at both the national and community levels;
- (d) Promote awareness and public education of Canadians about the IRS system and its impacts;
- (e) Identify sources and create as complete an historical record as possible of the IRS system and legacy. The record shall be preserved and made accessible to the public for future study and use;
- (f) Produce and submit to the Parties of the Agreement<sup>2</sup> a report including recommendations<sup>3</sup> to the Government of Canada concerning the IRS system and experience including: the history, purpose, operation and supervision of the IRS system, the effect and consequences of the IRS (including systemic harms, intergenerational consequences and the impact on human dignity) and the ongoing legacy of the residential schools;
- (g) Support commemoration of former Indian Residential School students and their families in accordance with the Commemoration Policy Directive (Schedule “X” of the Agreement).

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<sup>1</sup> This refers to the Aboriginal principle of “witnessing”.

<sup>2</sup> The Government of Canada undertakes to provide for wider dissemination of the report pursuant to the recommendations of the Commissioners.

<sup>3</sup> The Commission may make recommendations for such further measures as it considers necessary for the fulfillment of the Truth and Reconciliation Mandate and goals.

[19] Section 2 describes the powers, duties and procedures of the TRC and provides for its establishment by the appointment of the Commissioners by Order in Council.

[20] Sections 3 and 4 set out the responsibilities of the TRC and how it is to exercise its duties. Section 8 requires that it report within the first two years of its launch and that it conclude all its work within a five-year timeframe, which ends on July 1, 2014.

[21] Section 10 charges the TRC with funding and hosting seven national events across the country to engage the Canadian public and provide education about the IRS episode in Canadian history together with its legacies. The TRC is also required to assist communities in conducting similar but more local events, to gather personal statements from former students, and to hold a closing ceremony to recognize the significance of all the events over the life of its work.

[22] Throughout Schedule N, the importance for the TRC of truth telling, and of recording, preserving and making available to the public the history of the IRS experience is unmistakable. Section 11 provides for the TRC's access to relevant information. Section 12 requires the TRC to establish a national research centre to the extent that its budget permits. It is to be accessible to former students, their families and communities and future researchers.

[23] It is in this broad context that the four issues in this proceeding arise for decision.

**First Issue: Canada's Request for Direction to Strike Four Affidavits**

[24] Canada seeks to strike out four affidavits pursuant to Rule 25.11(b) and (c) of the *Rules of Civil Procedure*. Rule 25.11 reads as follows:

The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

(a) may prejudice or delay the fair trial of the action;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the court.

[25] Canada argues that the affidavits of Kent Roach and Ryan Bresser filed by the TRC, the affidavit of Shawn Atleo filed by the AFN, and the affidavit of Nellie Cournoyea filed by the Inuit Representatives should all be struck out in whole or in part. It says these affidavits are irrelevant and therefore scandalous, frivolous or vexatious. Alternatively it says they contain opinions and argument and are therefore an abuse of process. Canada does not assert prejudice arising from these affidavits.

[26] As the Court of Appeal for Ontario said in *Wernikowski v. Firm of Kirkland, Murphy & Ain*, [1999] 50 O.R. (3d) 124 at p. 126, because the exercise of the power in Rule 25.11 can deny a litigant a full hearing of its claim, it must be exercised only in the clearest of cases.

[27] Canada's complaint about the Roach affidavit is not that it is irrelevant, but that it expresses opinions and conclusions about the definition of "legacy" used by the TRC.

[28] I do not read it that narrowly. While some of the affidavit might be viewed as advocacy, large parts of it are fact-specific and speak to the kinds of documents that Canada has that are relevant to the TRC's legacy mandate.

[29] While its scope is disputed, the legacy mandate of the TRC is clearly an important part of its work. Hence the importance of the second substantive question before me. Much of the Roach affidavit contains factual descriptions of the kinds of documents that would likely have existed when the Settlement Agreement was concluded that would fall within or outside certain definitions of "legacy". This may be relevant to the factual matrix from which the Settlement Agreement emerged and therefore to my task of interpretation.

[30] Thus I do not think that the Roach affidavit should be struck out. Nor do I think parts of it should be struck out. Unlike a pleading which sets out claims or defences, an affidavit like this is a narrative. In this case, parsing it to determine what might or might not be acceptable is an artificial exercise that I do not propose to engage in.

[31] Canada's complaint about the Bresser affidavit is that it speaks only to the TRC's efforts to establish the national research centre called for in the Settlement

Agreement. As such it is completely irrelevant, says Canada, to the questions before me and should be struck out.

[32] I agree. The Bresser affidavit does not speak at all to the factual matrix relevant to the Settlement Agreement. Indeed the interpretation of Section 12 of Schedule N is not a matter of dispute in these proceedings. This affidavit is struck out.

[33] Canada challenges the Atleo affidavit on the basis of relevance. Its main complaint is that the affidavit addresses the AFN's subjective intention in entering the Settlement Agreement and contains facts that post-date its signing.

[34] I read the affidavit as about considerably more than that. The context from which the Settlement Agreement emerged was one which evolved over a number of years. It is not a commercial agreement that arose after a short sharp negotiating session between two corporate entities. Its context should not be arbitrarily limited as if it were.

[35] While neither the subjective intention of the AFN in entering the Settlement Agreement nor Mr. Atleo's opinion about its meaning are helpful to my task, I do not propose to try to disentangle specific paragraphs which may be to this effect from the narrative of the lengthy and difficult historical context which made Indian Residential Schools a matter of national importance and gave rise to this historic Agreement. Understanding this broad context does not drive interpretation, but is

helpful to my task of giving the Settlement Agreement meaning. I therefore decline to strike the Atleo affidavit.

[36] Canada's challenge to the Cournoyea affidavit is to much the same effect. It is said to contain opinion, the subjective intention of a party to the negotiations and post-Agreement efforts undertaken by the Inuit Representatives to locate documents.

[37] I acknowledge that there is some of that in the Cournoyea affidavit. But in the main, it describes the context of how the Inuit came to be a part of the Settlement Agreement. As with the Atleo affidavit, in light of the nature of the Settlement Agreement, I am of the view that this context may be helpful to my task. I therefore decline to strike this affidavit as well.

**Second Issue: Canada's Request for Direction to Strike Out the TRC's Request for Direction**

[38] Canada argues that the TRC has neither the legal capacity nor the standing to seek a judicial determination with respect to the Settlement Agreement. It therefore seeks to strike out the TRC's Request for Direction. Based on the same arguments, it seeks the same order with respect to the TRC's parallel application in the Ontario Superior Court of Justice.

[39] Canada's argument that the TRC lacks legal capacity to bring both these proceedings is quite simple. It says that all powers with respect to the conduct of litigation for or against the federal Crown are vested solely in the Attorney

General of Canada because of section 5(d) of the *Department of Justice Act*, R.S.C. 1985, c. J-2:

5. The Attorney General of Canada

...

(d) shall have the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada;

[40] Canada argues that to give effect to the Settlement Agreement, the TRC was created a federal department for all purposes by Order in Council. The Attorney General of Canada therefore has the exclusive conduct of any and all TRC litigation and since the Attorney General opposes the proceedings brought by the TRC, they cannot proceed.

[41] There is no doubt that the TRC is a unique creation. The only reference to its establishment in the Settlement Agreement is section 2 of Schedule N. That section says nothing about the TRC being a department of the Government of Canada:

**2. Establishment, Powers, Duties and Procedures of the Commission**

The Truth and Reconciliation Commission shall be established by the appointment of “the Commissioners” by the Federal Government through an Order in Council, pursuant to special appointment regulations.

[42] Following the signing of the Settlement Agreement, it became clear that there was a need to further clarify the structure of the TRC as outlined in the

Settlement Agreement as approved by the court. Further discussions resulted, which culminated in a letter of April 24, 2007 from Mr. Iacobucci to the interim executive director of the TRC. Canada acknowledges that, as the letter says, it documents the agreement of all parties about how the TRC would be legally established. Two paragraphs are particularly important:

While all parties at the table agreed that separateness and independence of the Commission was a core working assumption and, consequently, that the Commission would need to be institutionally independent from IRSRC or any other existing government department, there were differences of opinion about how best to achieve that goal. It was, however, agreed by all parties that independence (real and perceived) and impartiality were critical to the Commission's credibility and its ability to fulfill its mandate.

Consequently, it was agreed by all the parties that the TRC would be established as its own entity by Order in Council, pursuant to the Royal Prerogative power, independent from existing government departments, but forming part of the federal public administration for purposes of financial accountability, and to ensure that it would be subject to federal privacy and access to information legislation.

[43] The letter also detailed the specific Orders in Council that the parties agreed would be needed:

An Order (or Orders) establishing the Commission (and its mandate) and appointing the Commissioners, made pursuant to the Royal Prerogative Power;

An Order amending Schedule I of the *Financial Administration Act*, to add (designate) the Commission

as a “Department” and identifying a Minister as “appropriate minister” for the purposes of the Act. It was left unstated in the Settlement Agreement as to who would be the reporting Minister for the Commission;

Orders amending the respective schedules of the *Privacy Act* and the *Access to Information Act*, to add the Commission as a government institution (body or office) and Orders designating a person as “head” of the institution for purposes of those *Acts*; and

An Order under the *Public Service Employment Act*, designating the Commission as a “department” and identifying a person as the “deputy head” for the purposes of the Act.

[44] The first of these was effective June 1, 2008. It established the TRC and gave it the mandate set out in Schedule N of the Settlement Agreement. It makes no mention of the TRC being a department of the Government of Canada. This Order in Council gave the TRC its legal existence. In due course, the additional Orders in Council were passed. None purport to create the TRC a department of the Government of Canada for all purposes.

[45] In light of these considerations, I cannot agree with Canada that the TRC was established as a department of the Government of Canada for all purposes and therefore lacks the capacity to bring these proceedings because of the *Department of Justice Act*.

[46] I say this for a number of reasons. None of the Orders in Council make it a department for all purposes. As is made clear in the April 27, 2007 letter, Canada agreed that the required Orders in Council would be for the purposes of a

specific Act in each case, not for all purposes and certainly not for the purposes of the *Department of Justice Act*. Rather, Canada agreed that the TRC needed to be institutionally independent from all other existing government departments. In the face of this agreement, it is not open to Canada to argue that the TRC is a department of government for all purposes, and in particular that it is not independent of the Department of Justice. Nor would such an arrangement have made any sense, given the understanding on all sides that the independence and impartiality of the TRC were critical to its ability to fulfill its mandate.

[47] Thus I conclude that the TRC is not rendered without legal capacity to bring these proceedings because of the *Department Justice Act* and the opposition of the Attorney General of Canada to the proceedings.

[48] However, Canada also argues that the TRC has no standing to bring these proceedings. It says that, consequently, the TRC's Request for Direction and its Amended Notice of Application should be struck out.

[49] Canada makes two arguments. First, it says that both proceedings seek an interpretation of the Settlement Agreement to which the TRC is not a party. It argues that privity of contract prevents the TRC from seeking the enforcement of the Agreement.

[50] Second, Canada points to section 2(1) of Schedule N. It says that the TRC may refer disputes involving document production to the National Administration

Committee (the NAC) for decision. The NAC is set up by Section 4.11 of the Settlement Agreement. It is composed of representatives of seven parties to the Agreement, including Canada, the AFN and Inuit Representatives. Section 4.11(9) provides that if the NAC cannot reach a decision on a dispute referred to it, the dispute may be referred by four of its members to the appropriate court for resolution. Canada points out that the TRC has not availed itself of this dispute resolution mechanism, which the parties have agreed may be used to resolve the very kind of dispute that the TRC seeks to bring to this court. Moreover, says Canada, nothing in the Settlement Agreement gives the TRC standing to come directly to the court to seek resolution of such a dispute.

[51] The TRC offers several answers. Its primary response is that Canada's challenge to its standing is now effectively a moot question because the AFN and the Inuit Representatives have both sought answers to the same two questions that the TRC raises in its Revised Request for Direction.

[52] In oral submissions in this court, both made the same Request for Direction that the TRC makes, and for the same reasons. Both appear to have advised Canada previously of their intention to do so. Canada raises no objection concerning the lateness of these requests nor does it claim that it is prejudiced by them. Indeed it is hard to see how that could be, given that the questions and the materials relevant to them are exactly those in the TRC's Revised Request for Direction. Nor can Canada raise privity of contract against the AFN and the

Inuit Representatives. They are signatories and parties to the Settlement Agreement.

[53] Canada's only remaining argument is that neither the AFN nor the Inuit Representatives have availed themselves of the dispute resolution mechanism provided by the NAC. Without having done so, Canada says they cannot seek the court's assistance on the two questions concerning the extent of Canada's obligations under the Settlement Agreement.

[54] I do not agree with this argument. The mandate of the NAC is defined in the Settlement Agreement and gives the NAC a variety of specific tasks. The only one related to document production is to review and determine references involving document production that the TRC may refer to it. The NAC has no mandate to resolve disputes that arise between Canada and the AFN or the Inuit Representatives involving the obligations of Canada to provide documents under the Settlement Agreement. It is not therefore a precondition to the AFN and the Inuit Representatives seeking direction from the court concerning the extent of those obligations that they first take the dispute to the NAC.

[55] In my opinion, there is no reason why I should not hear the Requests for Direction brought by the AFN and Inuit Representatives. They raise two legal issues relating to document production. These are the same two issues that the TRC raises in its Revised Request for Direction and its Amended Notice of

Application. They are issues that must be addressed whether or not the TRC has standing to bring its two proceedings. It is thus unnecessary to decide the question of the TRC's standing.

[56] While I do not therefore propose to address that question, were I to do so, I do have some concern about the applicability of the doctrine of privity of contract to the TRC's standing to seek direction on the meaning of the Settlement Agreement. I am not sure that the Settlement Agreement can be said to be simply a private contract that should be governed only by private law concepts like privity. There are arguably aspects of the Settlement Agreement that seek to structure relationships between Canada and Aboriginal people. The preamble of Schedule N says as much. Moreover, the TRC itself, while a product of the Settlement Agreement is established by an Order in Council which sets out its mandate. These two considerations raise the possibility that the Settlement Agreement can be viewed through the lens of public law as well as private law.

[57] However, it is unnecessary to resolve this issue, given the conclusion I have reached on the challenge to the TRC's standing. The two questions raised by the TRC, the AFN and the Inuit Representatives must be addressed in any event and to these I now turn.

**Third Issue: Canada's obligations under the Settlement Agreement with respect to archived documents at LAC**

[58] This issue requires a determination of whether the Settlement Agreement imposes any obligation on Canada to provide documents from LAC to the TRC and if it does the extent of that obligation. The answers require a careful reading of the relevant provisions of the Settlement Agreement.

[59] Schedule N makes clear that two tasks of fundamental importance to the TRC's mandate are the compiling of an historical record of the IRS system and its legacy and the preparation of a report that includes the history of the IRS system. It is helpful to repeat paragraphs (e) and (f) of section 1 of Schedule N setting out these two goals:

- (e) Identify sources and create as complete an historical record as possible of the IRS system and legacy. The record shall be preserved and made accessible to the public for future study and use;
- (f) Produce and submit to the Parties of the Agreement<sup>4</sup> a report including recommendations<sup>5</sup> to the Government of Canada concerning the IRS system and experience including: the history, purpose, operation and supervision of the IRS system, the effect and consequences of the IRS (including systemic harms, intergenerational consequences and the impact on human dignity) and the ongoing legacy of the residential schools;

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<sup>4</sup> The Government of Canada undertakes to provide for wider dissemination of the report pursuant to the recommendations of the Commissioners.

<sup>5</sup> The Commission may make recommendations for such further measures as it considers necessary for the fulfillment of the Truth and Reconciliation Mandate and goals.

[60] The importance of the historical record being available for the future use of former students, their families and communities and the public is set out in section 12 of Schedule N:

12. A research centre shall be established, in a manner and to the extent that the Commission's budget makes possible. It shall be accessible to former students, their families and communities, the general public, researchers and educators who wish to include this historic material in curricula.

For the duration of the term of its mandate, the Commission shall ensure that all materials created or received pursuant to this mandate shall be preserved and archived with a purpose and tradition in keeping with the objectives and spirit of the Commission's work.

The Commission shall use such methods and engage in such partnerships with experts, such as Library and Archives Canada, as are necessary to preserve and maintain the materials and documents. To the extent feasible and taking into account the relevant law and any recommendations by the Commission concerning the continued confidentiality of records, all materials collected through this process should be accessible to the public.

[61] Access by the TRC to the information needed to prepare an historical record and a report is obviously a critical precondition for the TRC to discharge these parts of its mandate. Section 11 of Schedule N addresses this. The critical question is what obligations Canada has under that section with respect to archived documents at LAC. The first and third paragraphs of section 11 are of particular importance:

## **11. Access to Relevant Information**

In order to ensure the efficacy of the truth and reconciliation process, Canada and the churches will provide all relevant documents in their possession or control to and for the use of the Truth and Reconciliation Commission, subject to the privacy interests of an individual as provided by applicable privacy legislation, and subject to and in compliance with applicable privacy and access to information legislation, and except for those documents for which solicitor-client privilege applies and is asserted.

...

Canada and the churches are not required to give up possession of their original documents to the Commission. They are required to compile all relevant documents in an organized manner for review by the Commission and to provide access to their archives for the Commission to carry out its mandate. Provision of documents does not require provision of original documents. Original or true copies may be provided or originals may be provided temporarily for copying purposes if the original documents are not to be housed with the Commission.

[62] The TRC, the AFN and the Inuit Representatives focus on the first of these two paragraphs. They say Canada has an unqualified obligation to produce all relevant documents in its possession or control. The third paragraph imposes a separate obligation to provide access to LAC for the TRC to do its own research.

[63] On the other hand, Canada's position is that the section 11 is specific in the obligation it places on Canada concerning LAC. That obligation is found only in the third paragraph and is limited to providing access to the TRC. Canada says its obligation to search its files and provide relevant documents to the TRC

applies only to the active and semi-active files of the departments of the Government of Canada, where those files have not yet been archived at LAC.

[64] Before turning to the resolution of these competing interpretations, several matters can be disposed of that are not in dispute.

[65] First, it is not in dispute that documents archived at LAC are in the possession and control of Canada. It is, after all, the archives of the government of Canada.

[66] Second, it is not contested that LAC is a source of documents that are relevant to the mandate of the TRC. As of November 26, 2012, the Department of Aboriginal Affairs and Northern Development (AANDC) has disclosed some 982,000 documents to the TRC. Of these, some 550,000 came from LAC. As explained by counsel, these were retrieved from LAC by AANDC in part as a part of the production required by the various actions and class actions brought against Canada. Beyond this number however, Canada advises that there was no estimate of the total number of relevant documents archived at LAC when the Settlement was signed, nor is there one today.

[67] Third, it is not an issue that any obligation of Canada to provide documents from LAC is subject to the privacy interests of individuals, solicitor-client privilege, and cabinet confidentiality.

[68] The principles of interpretation applicable to the Settlement Agreement are straightforward. The text of the Agreement must be read as a whole. The plain meaning of the words used will be important as will the context provided by the circumstances existing at the time the Settlement Agreement was created. A consideration of both is necessary to reach a proper conclusion about the meaning of the contested provisions.

[69] In my view, the first paragraph of section 11 sets out Canada's basic obligation concerning documents in its possession or control. The plain meaning of the language is straightforward. It is to provide all relevant documents to the TRC. The obligation is in unqualified language unlimited by where the documents are located within the government of Canada. Nor is the obligation limited to the documents assembled by Canada for production in the underlying litigation.

[70] The third paragraph of section 11 is equally clear. While Canada is not obliged to turn over its originals, it is required to compile all relevant documents in an organized manner for review by the TRC. It is in that context that Canada is obliged to provide access for the TRC to LAC to review these documents and to carry out its mandate. If originals are not turned over, access is necessary for the TRC to review them.

[71] I therefore conclude that given their plain meaning, the language in section 11 of Schedule N does not exclude documents archived at LAC from Canada's

obligation to the TRC. The context in which the Settlement Agreement was created provides further important support for that conclusion in several ways.

[72] First, telling the history of Indian Residential Schools was clearly seen as a central aspect of the mandate of the TRC when the Settlement Agreement was made. Since Canada played a vital role in the IRS system, Canada's documents wherever they were held, would have been understood as a very important historical resource for this purpose.

[73] Second, the Settlement Agreement charged the TRC with compiling an historical record of the IRS system to be accessible to the public in the future. Here too, Canada's documents, wherever housed, would have been seen as vital to this task.

[74] Third, the story of the history and the historical record to be compiled cover over 100 years and dates back to the nineteenth century. In light of this time span, it would have been understood at the time of the Settlement Agreement that much of the relevant documentary record in Canada's possession would be archived in LAC and would no longer be in the active or semi-active files of the departments of the Government of Canada.

[75] Fourth, it would have been obvious that the experienced staff at LAC would have vastly more ability to identify and organize the relevant documents at LAC than would the newly hired staff of the newly formed TRC. It would have

made little sense to give that task to the latter rather than the former, particularly given its importance to the TRC's mandate.

[76] Finally, this differential is compounded by the reality that the Settlement Agreement gave the TRC a time limit, a limited budget and a number of important tasks in addition to preparing its report and the historical record. This too would have been obvious to those creating the Settlement Agreement and points to Canada having the obligation concerning LAC rather than the TRC.

[77] To summarize, the importance of Canada's documents archived at LAC to two of the TRC's essential tasks, the comparative expertise of LAC's staff in identifying archived document relevant to these tasks and other significant aspects of the mandate that the TRC had simultaneously to accomplish in a fixed timeframe with a fixed budget, were all part of the context in which the Settlement Agreement came about. All are inconsistent with excluding documents archived at LAC from Canada's obligation to provide relevant documents to and for the use of the TRC, compiled in an organized manner. None suggest that the TRC would be left on its own with LAC documents. This simply adds weight to the plain meaning of the words used, that Canada's obligation to provide all relevant documents includes those housed at LAC.

[78] This frames Canada's obligation concerning documents archived at LAC and resolves the difference between Canada and the TRC that gave rise to these

Requests for Direction. It would be both impossible and unwise to try to determine the full extent of this obligation in advance of a further particular dispute about its scope. However, some detail can usefully be added.

[79] As applied to LAC, Canada's obligation is to provide relevant documents which all agree means documents relevant to the TRC's mandate. As the change to the Ontario *Rules of Civil Procedure* made on January 1, 2010 demonstrates, this is a less expansive and more targeted obligation than one requiring provision of documents "related to" or "possibly relevant to" the TRC's mandate. Just because an archived document mentions an Indian Residential School, does not mean that it must be provided.

[80] In my view, relevant documents are those that are reasonably required to assist the TRC to discharge its mandate. Viewing the obligation through the lens of reasonableness is important, as counsel for the TRC acknowledged in argument. It is akin to the modulating concept of proportionality that now applies to document production in civil actions in Ontario, which recognizes that exhaustive production is antithetical to just outcomes.

[81] Equally important in giving meaning to the obligation is a careful examination of the mandate itself. There is no doubt about the centrality of both telling the history of the IRS experience and compiling an historical record about it for future generations. Both are fundamental to the work of the TRC.

Documents archived at LAC are obviously vital to these aspects of the TRC's mandate.

[82] However, there are several provisions of the Settlement Agreement that would appear to be relevant to fixing the extent of this obligation. For example, section 1(e) charges the TRC with the goal of creating "as complete an historical record as possible of the IRS system and legacy". This may suggest that something short of perfection is the objective. A second example is section 2(h). Its prohibition on the TRC making use of personal information may also affect the extent of Canada's obligation.

[83] In summary, Canada's obligation to provide documents to the TRC extends to the documents archived at LAC. Further definition of the precise extent of this obligation is best left for resolution in specific contexts that may require it.

#### **Fourth Issue: Canada's obligations under the Settlement Agreement in relation to the TRC's Legacy Mandate**

[84] The TRC and Canada have joined issue over the extent of Canada's obligation under the Settlement Agreement to provide documents to the TRC relevant to its legacy mandate. While they differ over the extent of that mandate, they both acknowledge that it is properly described in section 1(f) as "...the effect and consequences of IRS (including systemic harms, intergenerational consequences and the impact on human dignity) and the ongoing legacy of the

residential schools”. This is the legacy mandate on which section 1(f) obliges the TRC to report.

[85] It is true that “legacy of Indian Residential Schools” is a defined term in the Funding Agreement that constitutes Schedule M of the Settlement Agreement. That definition is in slightly different language than section 1(f) of Schedule N and is, as Schedule M makes clear, only for the purposes of the Funding Agreement. For TRC purposes, it is the language in Schedule N that matters.

[86] The dispute here is not so much over whether documents are “relevant to” the TRC’s legacy mandate but over the extent of the mandate itself. Thus, while applicable here, it is not necessary to repeat what I have said concerning the meaning to be given to “relevant to”. Suffice it to say that Canada’s obligation in connection with this aspect of the TRC’s work is to provide the documents in its possession or control that are reasonably required to assist the TRC to tell the story of the legacy of Indian Residential Schools.

[87] Defining the full extent of the TRC’s legacy mandate is a task that ought not to be attempted in the abstract. It can reasonably be undertaken only in the context of specific differences that arise over what is and what is not within the mandate. The TRC and Canada have raised four such differences in the proceeding.

[88] First, there is some suggestion in the TRC's materials that Canada proposes an arbitrary cut-off date for its obligation. For example, it is said that Canada proposes not to provide any documents concerning a particular school created after the school closed.

[89] I do not take that to be Canada's position. Nor would it be one that is sustainable. An arbitrary cut-off date would be incompatible with the mandate extending to "the ongoing legacy" of the residential schools.

[90] Second, Canada suggests that because health is addressed in a separate component of the Settlement Agreement on healing, health does not fall within the TRC's legacy mandate.

[91] I do not agree. It is true that section 4 of Schedule N provides that the TRC is not to make recommendations on matters already covered in the Settlement Agreement. It is also true that Schedule M addresses a healing strategy to deal with the healing needs of Aboriginal people affected by the legacy of Indian Residential Schools. However, the adverse health effects on former students, their families and communities that have been suffered due to the IRS experience are not the same thing as a healing strategy for the future. Nor is reporting on those health effects the same as making recommendations for the future to address those effects. In my view, Canada is obliged to provide to the

TRC the documents it has that are reasonably required to tell the story of the IRS legacy, including its health aspect.

[92] Third, there is a suggestion in Canada's materials that its obligation is limited only to documents that concern policy or operations of the IRS system. In my view, that is not a useful pair of categories. It is too limited a rule of thumb. One can easily imagine documents such as historical descriptions of harms caused by residential schools that would not fit easily into either category, but would clearly be important to tell the story of the legacy of the IRS system.

[93] Lastly, the TRC and Canada differ over whether the TRC's legacy mandate extends to an examination and evaluation of Canada's responses to the impacts of the Indian Residential Schools experience. The TRC says its legacy mandate extends to its evaluation of the adequacy of those responses, including what policies were considered, which ones were implemented and which were not, and Canada's rationales for each. On the other hand, Canada says that the TRC's mandate does not include examinations of the responses Canada has made to address the Indian Residential Schools experience.

[94] In my view, Canada's position is correct. I say this for several reasons.

[95] The Settlement Agreement describes the TRC's legacy mandate in section 1(f). To reiterate, the TRC is to report on "the effect and consequences of IRS (including systemic harm, intergenerational consequences and the impact on

human dignity) and the ongoing legacy of the residential schools”. This requires the TRC to describe for Canadians the terrible harms caused in so many ways past and present to Aboriginal people due to the IRS system.

[96] In my view however, the plain meaning of this language does not extend to Canada’s responses to these harms or an evaluation of their adequacy. I do not think that, for example, the Prime Minister’s apology in June 2008 can be described as a harm caused by the IRS system.

[97] In addition, as Canada points out, section 4 of Schedule N prohibits the TRC from making recommendations on matters covered in the Settlement Agreement. Much of the Settlement Agreement covers responses by Canada to the IRS experiences of Aboriginal people. The compensation scheme set up for former students and their families is but one example. The TRC would appear to be precluded from evaluating the adequacy of those responses by section 4 of Schedule N.

[98] Finally, the evaluation of the adequacy or inadequacy of the policy responses of the Government of Canada would seem to be the natural mandate for a public inquiry. While the legacy mandate of the TRC could have been clearly written to encompass this task, the fact that the parties agreed in section 2(b) of Schedule N that the TRC was not to act as a public inquiry is suggestive of the exclusion of this task from the TRC’s work.

